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No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

S. FRANKLIN BURFORD, - - - Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, - - - - - - Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

ROBERT K. EMERSON
Counsel of Record
HOWARD R. CREWS, JR.
J. PATRICK JONES
CAMPBELL, WOODS, BAGLEY, EMERSON, McNEER & HERNDON
Post Office Box 1835
Huntington, West Virginia 25719
(304) 529-2391

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED FOR REVIEW

1. Whether 26 U.S.C. §6214(a) (1984) confers jurisdiction upon The United States Tax Court to redetermine an item of income tax deficiency when the same item had been previously assessed by the Commissioner of Internal Revenue.

2. Whether the Commissioner of Internal Revenue may abate a partially collected income tax assessment made more than six years earlier in order to confer jurisdiction upon the Tax Court to determine a deficiency with respect to the prior assessment and thereby extend the applicable statute of limitations.

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1. S. Franklin Burford v. Commissioner of Internal Revenue No. 86-2010 (4th Cir. 1986)
2. S. Franklin Burford and Fern J. Burford v. Commissioner of Internal Revenue, 53 T.C.M. (P-H) 466 (1984)

STATEMENT OF JURISDICTION

The judgment for which review is sought was rendered by the United States Court of Appeals for the Fourth Circuit on September 11, 1986, with rehearing denied on October 21, 1986. Jurisdiction before the United States Supreme Court is founded upon 28 U.S.C. § 2101(c) (1949).

APPLICABLE STATUTORY PROVISIONS

The citations for the applicable statutory provisions are set forth below with the pertinent text set forth verbatim in the appendix:

26 U.S.C. 6211 (1980)
26 U.S.C. 6213 (1984)
26 U.S.C. 6214 (1984)
26 U.S.C. 6404 (1954)
26 U.S.C. 6502 (1966)
26 U.S.C. 6512 (1962)
26 U.S.C. 7442 (1954)

No.

IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This petition for certiorari results from a determination by the United States Court of Appeals for the Fourth Circuit that the United States Tax Court in a proceeding initiated in 1980 to determine the petitioner's income tax liability for the year 1976 properly exercised jurisdiction over an income tax assessment made in 1977 by the Commissioner against petitioner and partially collected by the Commissioner.

The facts material to the questions presented are as follows:

1. Petitioner filed a timely federal income tax return for the calendar year 1976. He reported a long-term capital gain from the sale of mining stock and

computed on Form 4625, attached to his return, minimum tax in the amount of $270,289.53 upon the capital gains deduction, an item of tax preference. Petitioner, although reporting the minimum tax on this form, failed to include the minimum tax in his tax computation of tax due and did not pay this tax.

2. The Commissioner of Internal Revenue (hereinafter "Commissioner") treated the omission of minimum tax as a clerical or mathematical error and on April 15, 1977, issued an assessment against petitioner in the amount of the omitted minimum tax pursuant to 26 U.S.C. § 6213(b) (1984). The Commissioner then began collection of the assessment by crediting refunds of $205,354.72 otherwise due to petitioner with respect to years other than 1976.

3. Thereafter, the Commissioner recalculated petitioner's 1976 income tax liability, determined a deficiency for such year and on April 14, 1980, issued a notice of deficiency. The notice of deficiency specifically excluded the previously assessed minimum tax and the Commissioner in the notice specifically refused to abate the previous assessment of minimum tax. Accordingly, the liability of petitioner for minimum tax was not then at issue before the Tax Court.

4. On July 9, 1980, petitioner filed in the United States Tax Court his petition seeking a redetermination of the deficiency asserted by the Commissioner in the notice of deficiency. The petition did not contain assignments of error regarding the previous assessment of minimum tax because this issue was specifically

excluded by the Commissioner from the notice of deficiency.

5. The Commissioner filed an answer to the petition and did not raise any issue relating to the minimum tax previously assessed.

6. On account of the continuing threats made by the Commissioner to levy upon his property, petitioner, on September 30, 1982, instituted an action in the United States District Court for the Southern District of West Virginia for the purpose of enjoining the Commissioner from further collection of the minimum tax assessment upon the ground, *inter alia,* that petitioner had not been properly notified of such assessment. The District Court, by preliminary injunction, enjoined the Commissioner from attempting to collect such assessment until further order of the Court. In his answer to petitioner's complaint filed in District Court, the Commissioner did not allege or concede that the assessment was erroneous, but defended the validity of the assessment.

7. On July 14, 1983, over the objections of petitioner, the Commissioner filed an amended answer in the Tax Court wherein he alleged that the previous assessment of minimum tax was erroneous and sought to increase the original deficiency by the amount of the minimum tax assessment. The Tax Court permitted the filing of such answer even though the amount of the previously assessed minimum tax, together with interest thereon, had not then been abated.

8. It was not until on August 15, 1983, that the Commissioner abated the minimum tax which had been

assessed more than six years earlier and refunded to petitioner the amounts collected with interest.

9. On December 16, 1983, the Commissioner filed in the Tax Court a motion for partial summary judgment seeking, *inter alia,* a summary adjudication of the minimum tax issue. In his reply to this motion, petitioner alleged and argued that the Tax Court, under the provisions of 26 U.S.C. § 6211(a)(1)(B) (1980), did not have jurisdiction to determine the minimum tax issue.

10. On February 6, 1984, the Commissioner, over the objections of petitioner, filed with the Tax Court a substituted amendment to his answer alleging that the deficiency shown in the original notice of deficiency should be increased by the amount of the minimum tax, that the prior assessment of minimum tax was erroneous, and that such assessment had been abated and the amounts collected had been refunded.

11. On September 4, 1984, the Tax Court rendered its decision in effect sustaining the Commissioner's motion for partial summary judgment with respect to the minimum tax issue. In its opinion, the Court, without considering the effect on its jurisdiction of the prior assessment made by Commissioner against petitioner with respect to the minimum tax which was outstanding at the time of the filing of the notice of deficiency and without considering the propriety of the Commissioner's abatement of such assessment long after the petition to the Tax Court had been filed, held —"It is clear that where a notice of deficiency in income tax has been properly sent to a taxpayer and a petition

timely filed, this Court has jurisdiction to redetermine the *entire* income tax liability of the taxpayer." *Burford* v. *Commissioner,* 53 T.C.M. (P-H) 466 (1984) (emphasis supplied).

12. As a consequence of the Tax Court's decision, petitioner took no further action to prosecute his claim against the Commissioner in the injunction action pending in the United States District Court, and the action was dismissed on July 1, 1985, by the District Court for petitioner's failure to prosecute.

13. On January 8, 1986, the Tax Court, pursuant to its opinion, entered an order determining a deficiency in petitioner's income tax for the year 1976 in the amount of $363,075.09, which deficiency included $262,546.79 in minimum tax.

14. Petitioner then filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit, contending, *inter alia,* that the Tax Court lacked statutory jurisdiction to determine a deficiency as to the petitioner's minimum tax for the year 1976. Following hearing and oral argument, the Court of Appeals, by a decision entered September 11, 1986, affirmed the decision of the Tax Court. The Court of Appeals, in an unpublished *per curiam* decision, without discussion of the assessment made by Commissioner against petitioner with respect to the minimum tax, held that the Tax Court had jurisdiction even though the liability for minimum tax had not been included in the notice of deficiency. A petition for rehearing of the Court of Appeals' decision was filed by petitioner but the same was denied by the Court of Appeals on October 21, 1986.

ARGUMENT

I. 26 U.S.C. § 6214(a) Does Not Enlarge the Jurisdiction of the Tax Court to Redetermine a Deficiency of a Previously Assessed Tax.

The United States Tax Court is a court of limited jurisdiction which may exercise only such jurisdiction specifically conferred by statute. *Commissioner of Internal Revenue* v. *Gooch Milling & Elevator Co.*, 320 U. S. 418 (1943); *Continental Equities, Inc.* v. *Commissioner of Internal Revenue*, 551 F. 2d 74 (5th Cir. 1977). 26 U.S.C. § 7442 (1954) provides that the Tax Court shall have such jurisdiction as conferred upon it by Title 26 of the United States Code. The express grant of jurisdiction is found in 26 U.S.C. § 6213 (1984) (hereinafter "§ 6213") which permits the Tax Court to redetermine a deficiency in federal taxes after a "notice of deficiency" is issued to a taxpayer and the taxpayer files a petition for redetermination of his alleged tax liability. See Rule 13, Tax Court Practice and Procedure.

The word "deficiency" is the touch stone for Tax Court jurisdiction and is defined by 26 U.S.C. § 6211 (hereinafter "§ 6211") to mean the amount by which the tax imposed exceeds the excess of the sum of the amount shown on the taxpayer's return plus the amounts previously assessed over the amount of rebates.

§ 6211 clearly provides that "amounts previously assessed" do not constitute a part of the "deficiency" and, accordingly, any tax previously assessed and any

tax issues raised by such assessment are not subject to the jurisdiction of the Tax Court. See *Estate of Young* v. *Commissioner,* 81 T.C. 879 (1983); *Harold W. Grubart,* 50 T.C.M. (P-H) 363 (1981).

It is clear in the instant case that neither the abatement of the previously assessed minimum tax nor the refund to petitioner of tax collected under the assessment constitute a "rebate" as defined in § 6211(b)(2) and, therefore, the sole question presented is whether the Tax Court had jurisdiction over the prior assessment of minimum tax.

In the case at bar, the notice of deficiency issued by the Commissioner did not, in fact, include the minimum tax previously assessed and, indeed, the Commissioner in the notice of deficiency refused to abate such tax.

The Tax Court, in its decision, summarily ignored the propriety and efficacy of the abatement of the minimum tax by the Commissioner which occurred over three years after the notice of deficiency had been issued. It determined that the jurisdiction of the Court was founded upon 26 U.S.C. § 6214(a) (1984) (hereinafter "§ 6214(a)") which provides, in substance, that the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so determined is greater than the amount of the deficiency. We submit that § 6214(a) does not constitute an independent basis for Tax Court jurisdiction, but is merely complimentary or incidental to the jurisdictional requirements of § 6213. See *Estate of Young, supra.*

The United States Court of Appeals, in affirming the decision of the Tax Court, also held that § 6214(a) conferred independent jurisdiction upon the Tax Court.

We do not dispute that the Tax Court generally has jurisdiction to redetermine a deficiency to include a tax issue not raised initially in the notice of deficiency sent by the Commissioner. We do respectfully submit, however, that when the tax issue in question is the same tax issue which forms the basis of a previous assessment, the Tax Court has, by the plain language of the applicable statutes, no jurisdiction to consider such issue and cannot obtain jurisdiction by permitting the Commissioner to abate improperly a pending assessment.

For the reasons hereinafter set forth, we believe it is clear that the subsequent abatement of the assessment by the Commissioner was unlawful and that the abatement did not in itself confer jurisdiction which was lacking at the time of the filing of petitioner's petition in the Tax Court.

We submit that this unwarranted extension of jurisdiction by the Tax Court and the Court of Appeals for the Fourth Circuit calls for an exercise of this Court's power of supervision.

II. The Abatement by the Commissioner Was Made Without Statutory Authority and Did Not Provide the Tax Court With Jurisdiction Over the Previously Assessed Minimum Tax.

Two remedies were available to the Commissioner in respect to his treatment of the omitted minimum tax upon petitioner's 1976 tax return. The Commissioner

could treat such omission as a mathematical or clerical error under § 6213(b)(1) and make an immediate assessment or, in the alternative, determine a deficiency under § 6211 and issue a notice of deficiency.

The Commissioner elected to pursue the first remedy and on April 15, 1977, issued an assessment against petitioner in the amount of the omitted minimum tax, thereby depriving petitioner of his right to contest the validity of the tax issue before the Tax Court. The bulk of this assessment was, in fact, collected by the Commissioner who excluded the previously assessed minimum tax from the notice of deficiency issued to petitioner on April 14, 1980.

The Commissioner steadfastly refused to abate the assessment for a period of more than six years from the date the statute of limitations prescribed by 26 U.S.C. § 6502 (1966) began to run upon the collection of the alleged liability. On July 14, 1983, the Commissioner completely reversed his prior position by belatedly alleging that the assessment was erroneous and that the original deficiency should be increased by the amount of the assessment. Thereafter, on August 15, 1983, the Commissioner, without any statutory authority, abated the previously assessed minimum tax and refunded to petitioner the amounts collected from him.

The abatement was contrary to the express provisions of 26 U.S.C. § 6404 (1954) which specifically limits an abatement to the *unpaid* portion of the assessment. In the instant case the *entire* assessment was abated, including over $200,000 which had been collected by the Commissioner. Moreover, the refund to

petitioner was prohibited by 26 U.S.C. § 6512 (1962), which provides that if a taxpayer files a petition with the Tax Court, no credit or refund of income tax for the same taxable year shall be allowed.

More significantly, 26 U.S.C. § 6502 (1966) limits the Commissioner to six years for collection by levy or by a proceeding in a court of any tax which has been assessed. To permit the Commissioner to abate this assessment over six years after the date it was made greatly prejudices the petitioner as it permits the Commissioner to extend the statute of limitations for collection of the tax by an additional six years.

Finally, in abating the assessment, the Commissioner effectively eliminated the jurisdiction of the District Court in the pending injunction proceeding with the expectation of receiving more favorable treatment in the Tax Court. The forum shopping tactics employed by the Commissioner and sanctioned by the Tax Court are clearly inappropriate.

CONCLUSION

The Tax Court had no jurisdiction to sustain the Tax Commissioner's motion for partial summary judgment with respect to the issue of minimum tax. The United States Court of Appeals for the Fourth Circuit, by affirming the decision order of the Tax Court, erred in confirming the jurisdiction of the Tax Court to determine the minimum tax issue. Therefore, petitioner respectfully urges this Court to reverse the decision of the Court of Appeals and to direct the Tax

Court to recompute petitioner's income tax liability for the year 1976 under Tax Court Rule 155 by eliminating therefrom the minimum tax asserted by the Commissioner.

Respectfully submitted,

ROBERT K. EMERSON
Counsel of Record

HOWARD R. CREWS, JR.
J. PATRICK JONES
CAMPBELL, WOODS, BAGLEY, EMERSON, McNEER & HERNDON
Post Office Box 1835
Huntington, WV 25719-1835
(304) 529-2391

PROOF OF SERVICE

The undersigned, of counsel for the petitioner and member of the Bar of this Court, does hereby certify that the foregoing Petition for Certiorari has been served in compliance with U. S. Sup. Ct. Rule 28.3 upon all parties required to be served by depositing three copies of the document in a United States Post Office, first-class postage prepaid, addressed to the following counsel of record at their post office address.

Roger M. Olsen, Esquire
Acting Assistant Attorney General

Michael C. Paup, Esquire
Richard Farber, Esquire
Mary Frances, Esquire
Tax Division
Department of Justice
P.O. Box 502
Washington, D.C. 20044

Done the 17TH day of JANUARY, 1987.

APPENDIX

T. C. Memo. 1984-466

UNITED STATES TAX COURT

S. Franklin Burford and
Fern J. Burford, - - - - - *Petitioners,*

v.

Commissioner of Internal Revenue, - - *Respondent.*

Docket No. 12466-80. — Filed September 4, 1984.

Michael E. Caryl, Arnold K. Mytelka, Alan Rubin, Gerald H. Litwin and Jeffry M. Schwartz, for petitioner S. Franklin Burford.

Bertram L. Potemken, for petitioner Fern J. Burford.

Cynthia J. Mattson and Ronald D. Pinsky, for the respondent.

MEMORANDUM OPINION

Scott, Judge: This case is before the Court on respondent's motion for partial summary judgment, filed December 16, 1983, pursuant to Rule 121.[1] The record shows that respondent determined a deficiency in petitioners' Federal income tax for the calendar year 1976 in the amount of $328,702.56. One of numerous adjustments in the notice of deficiency was the disallowance of $470,442 of a loss claimed by petitioner with respect to his interest in a limited partnership, Marietta Mines, Ltd. The adjustment resulted from the disallowance of a deduction of $3

[1] All Rules references are to the Tax Court Rules of Practice and Procedure.

million claimed by Marietta Mines, Ltd., for payment of an advanced mineral royalty on its partnership return of income tax for the calendar year 1976.

A Form 4625, Computation of Minimum Tax, is attached to the notice of deficiency showing a minimum tax due by petitioners of $243,418.42 based on a capital gains deduction claimed on petitioners' 1976 Federal income tax return of $2,062,852.57. In explanation of his computation, respondent stated that petitioners had discussed with employees of respondent the abatement of the assessment of the minimum tax imposed on items of tax preference, and that petitioners' request for abatement had been given careful consideration, but it had been determined that no abatement or reduction in the total tax liability was appropriate. Respondent further explained that section 56[2] imposed a minimum tax on items of tax preference and that the minimum tax due by petitioners as computed by respondent was $243,402.67.

Respondent, in his motion for summary judgment, states that the issues to be decided are (1) whether petitioners may deduct their distributive share of a partnership loss to the extent that such loss resulted from the deduction in 1976 by the partnership of an advanced mineral royalty in excess of the amount applicable to the actual production and sale of minerals, and (2) whether the minimum tax imposed by section 56 on an item of tax preference is constitutional.

In his motion for partial summary judgment, respondent alleged that both of the above stated issues could be determined as a matter of law on uncontroverted facts.

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[2]Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954, as amended and in effect during the year here in issue.

Petitioners initially took the position with respect to the claimed deduction by the partnership of an advanced mineral royalty that there were genuine issues of fact material to the determination of the issue and, with respect to the minimum tax, that the Court did not have any issue concerning the minimum tax properly before it. In a later filed brief, petitioners took the position that there were uncontroverted facts in the record in this case sufficient to support a summary determination in petitioners' favor on both issues involved in respondent's motion and requested the Court to make a summary determination in petitioners' favor.

Respondent states that the uncontroverted facts in this case show that a partnership, Marietta Mines, Ltd., was formed on December 28, 1976, and on December 31, 1976, this partnership entered into a lease with Minerals Management, Ltd., 1976, under which it was granted rights to mine certain properties to which the lessor held mineral leases. The lease provided that the lessee should pay to the lessor an advanced production royalty of $3 million by delivery of a promissory note payable in 300 equal monthly installments of $10,000 each beginning in January 1977. On December 31, 1976, Marietta Mines, Ltd. (the partnership), gave to the lessor a nonrecourse note for $3 million in discharge of its stated obligation under the lease for payment of an advanced royalty. No minerals were mined or sold in 1976 by the partnership and there was no lease or binding obligation entered into by the partnership prior to October 29, 1976.

It is respondent's position that under the facts in this case which he contends are uncontroverted and pursuant to our decisions in *Gauntt* v. *Commissioner,* 82 T.C. 96 (1984); *Wing* v. *Commissioner,* 81 T.C. 17 (1983); *Wendland* v. *Commissioner,* 79 T.C. 355 (1982), affd. sub nom. *Redhouse* v. *Commissioner,* 728 F. 2d 1249 (9th Cir. 1984),

upholding the retroactive effect of an amendment by T.D. 7523, 1978-1 C.B. 192, to section 1.612-3(b)(3), Income Tax Regs., he is entitled to a partial summary judgment with respect to his disallowance of the portion of petitioners' claimed loss from Marietta Mines, Ltd., applicable to the deduction claimed by that partnership of the $3 million advanced royalty.

Section 1.612-3(b)(3), Income Tax Regs., was amended by T.D. 7523, *supra,* to provide that an advanced royalty paid or accrued in connection with mineral property is deductible by the payor from gross income for the year the mineral product in respect of which the advanced royalty was paid or accrued is sold. T.D. 7523 provides that the modification made thereby in the treatment of advanced royalties paid or accrued in connection with mineral properties is effective with respect to such advanced royalties paid or accrued after October 29, 1976, the date of a news release, IR-1687, announcing the proposed amendment to the regulation. This regulation further provided that the amendment would not apply if prior to October 29, 1976, the payment of the advanced royalty was required pursuant to a mineral lease which was binding upon the party paying or accruing such royalty, or if the payment of the advanced royalty was required by reason of a written contract which bound the party paying or accruing such royalty to execute a lease requiring the payment of the advanced royalty. The regulation further provides that it is incumbent upon the party claiming an advanced royalty deduction to establish that under all of the facts and circumstances the contractual obligation to pay the advanced royalty was binding upon him prior to October 29, 1976, and that a contract will in no event be considered binding upon a party if the obligations imposed on the party prior to October 29, 1976, were not substantial or were illusory.

Petitioner, in response to respondent's motion for summary judgment, filed several affidavits with numerous exhibits. The following is a brief summary of the pertinent facts set forth in the affidavits and exhibits attached thereto. P. J. Cutting and William R. Townsend, sometime prior to September 30, 1976, began negotiating with Minerals Management, Ltd., 1976 (MML 1976), for a mining lease on certain property under lease to MML 1976 on which gold and silver mining had previously been conducted. By a document entitled "Lease of Mining Property," dated September 30, 1976, MML 1976, a Nevada limited partnership, as the lessor, granted to Mr. Cutting, as lessee, rights to mine certain mineral properties. The document was a printed form executed by someone on behalf of MML 1976 and by Mr. Cutting. The spaces for amounts of royalties to be paid and other information were not filled in on the document. However, a further agreement, also dated September 30, 1976, was entered into between MML 1976, as lessor, and "P. J. Cutting and Partners," as lessees, which in addition to the printed material contained therein had a provision typed on it for payment of royalties by the lessee to the lessor with respect to certain mining properties specified in the lease. The typed statement provided that on December 20, 1976, lessee should pay to lessor an advanced production royalty of $3,725,000 by delivery of $125,000 in cash and a promissory note in the amount of $3,600,000 payable in 240 equal monthly installments beginning on the 20th day of January 1977. After September 30, 1976, there were conversations between Mr. Cutting and a representative of MML 1976 with respect to various aspects of the lease agreement. Written notes were made of these conversations and at least by October 21, 1976, there was a firm agreement with respect to the obligations of the parties under the lease dated September 30, 1976. By October 21, 1979, Mr. Cut-

ting had agreed to form a corporation, Marietta Mines, Inc., which would be owned totally by him. Mr. Cutting and the corporation were to be the general partners of a limited partnership which would have the rights and carry out the obligations that the oral general partnership, consisting of Mr. Cutting, his corporation to be formed and Mr. Townsend, had under the mining lease. On November 29, 1976, an agreement was entered into between MML 1976, as lessor, and Marietta Mines, Ltd., a New Jersey limited partnership, as lessee. This agreement recites that the lessor is the holder of certain patented and/or unpatented mining claims therein described and that the lessor and Mr. Cutting, on September 30, 1976, entered into a contract to lease covering the above described properties stipulating that the lessee would pay a minimum rental and a production royalty, and that they entered into further oral understandings expressly stating that the lessor would receive a prepaid production royalty of $3,625,000 which was to be paid by a nonrecourse promissory note. This agreement further recited that the contract to lease dated September 30, 1976, and the supplemental provisions thereto were premised upon the understanding that Mr. Cutting and a corporation controlled by him would become general partners of a limited partnership to be formed for the purpose of developing the leased properties and that the limited partnership would assume the benefits and obligations of the lease entered into between MML 1976 and Mr. Cutting. This document also referred to Mr. Townsend as participating in the negotiations as a representative of Mr. Cutting

Petitioners argue that based on the evidence they have produced, the partnership which ultimately became the limited partnership of Marietta Mines, Ltd., actually existed prior to October 29, 1976, because of agreements between Mr. Cutting, Mr. Townsend and Mr. Cutting's

corporation to carry on a mining business through a limited partnership to be formed by Mr. Cutting. Petitioners state that the variations in the lease as finally signed by the limited partnership on December 31, 1976, and the lease negotiated on behalf of the partnership by Mr. Cutting and Mr. Townsend were made pursuant to negotiations. The change in the amount of advanced royalty to be paid was in consideration for a change in the obligation assumed by the partnership. Petitioners argue that under the facts shown by the affidavits and exhibits, Marietta Mines, Ltd., was bound prior to October 29, 1976, to pay the $3 million advanced royalty that was paid on December 31, 1976, and therefore summary judgment should be entered in their favor. Petitioners argue that under the uncontroverted facts established in the record the partnership is entitled to the $3 million deduction for payment of an advanced royalty which it claimed for the year 1976. Petitioners state that although Mr. Burford (petitioner) was not a member of the partnership prior to October 29, 1976, under our holding in *Elkins* v. *Commissioner,* 81 T.C. 669 (1983), he is entitled to deduct his pro rata share of the partnership loss resulting from the partnership's deduction of the advanced royalty.

Respondent argues that the affidavits and exhibits submitted by petitioners do not establish an obligation of Marietta Mines, Ltd., to pay any advanced royalty prior to October 29, 1976, because that partnership was formed after October 29, 1976. Respondent also argues that although some of the same properties are involved, the properties covered by the lease dated December 31, 1976, differ materially from those covered by the lease signed on September 30, 1976. Respondent contends that any obligation of Marietta Mines, Ltd., to pay an advanced royalty is illusory. Respondent relies on *Gauntt* v. *Commissioner, supra,* to support this conclusion.

Respondent states that a limited partnership cannot be formed unless a partnership agreement is filed. Respondent concludes that the limited partnership, Marietta Mines, Ltd., could not have been obligated prior to October 29, 1976, to pay any advanced royalty because no partnership agreement forming the limited partnerships was filed in either New Jersey, where the limited partnership was ultimately formed, or Nevada, where any transactions that occurred prior to October 29, 1976, took place.

Petitioners argue that under the Uniform Partnership Act, which has been adopted by New Jersey, a partnership may be formed by an oral agreement of two or more persons to carry on a business operation if their intent is to form a partnership. Petitioners argue that pursuant to New Jersey law a limited partnership may succeed to the rights and obligations of a general partnership that was formed orally at an earlier time if the partners in the general partnership intended to form a limited partnership.

Respondent argues that the affidavits and exhibits filed by petitioners do not establish that the limited partnership, Marietta Mines, Ltd., had an obligation prior to October 29, 1976, to pay any advanced royalty. However, in his brief respondent contests the correctness of some of the facts which petitioners claim are established by the record.

The Uniform Partnership Act, which has been adopted by both New Jersey and Nevada, defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." New Jersey Stat. Ann. sec. 42:1-6(1)(1940); Nevada Rev. Stat. sec. 87.060 (1979). It is clear from this provision, as well as numerous cases interpreting the Uniform Partnership Act, that a general partnership may be formed by an oral agreement or understanding. See *Matter of September, 1975 Special Grand Jury*, 435 F. Supp. 538 (N.D. Ind. 1977); *Ruth* v. *Crane*, 392

F. Supp. 724 (E.D. Pa. 1975), affd. without published opinion 564 F. 2d 90 (3d Cir. 1977).

Rule 121(a) provides that a party may move for summary judgment on all or any part of the legal issues in controversy. Rule 121(b) provides that a decision shall be rendered if the pleadings, answers to interrogatories, depositions, admissions and other acceptable material show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law. The burden to show that there is no genuine issue of material fact is on the moving party. *Espinoza* v. *Commissioner,* 78 T.C. 412, 416 (1982).

In this case a genuine issue of material fact exists unless respondent is correct in his contention that as a matter of law the limited partnership, Marietta Mines, Ltd., is a different "party" from the general partnership that agreed to lease property from MML 1976. The factual issue is whether a general partnership existed prior to the formation of the limited partnership, Marietta Mines, Ltd., and if so, whether the relationship between the two partnerships caused the partnership, Marietta Mines, Ltd., to be obligated prior to October 29, 1976, to pay an advanced royalty to MML 1976.

As pointed out in *Bisno* v. *Hyde,* 290 F.2d 560, 651 (9th Cir. 1961), "there is a paucity of partnership law decisions handed down by the Nevada Supreme Court."[3] However, the Uniform Partnership Act as adopted in Nevada is similar to that adopted in most of the other States.

The law as interpreted in numerous States which have adopted the Uniform Partnership Act is that the purpose

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[3] Petitioners' argument is based primarily on the New Jersey law since the limited partnership, when formed, was a New Jersey partnership. However, although not clear from the record, it appears that the negotiations on which petitioners rely took place in Nevada.

of recording a certificate of limited partnership is to acquaint third persons with the status of the partnership. Even though the statute requiring the filing of a certificate must be complied with in order to establish a limited partnership, the failure to so comply does not necessarily preclude a partnership from being formed; such failure may render the association a general partnership. *Peerless Mills, Inc.* v. *American Tel. & Tel. Co.*, 527 F.2d 445, 449 (2d Cir. 1975); *Ruth* v. *Crane, supra* at 733; *Dwinell's Central Neon* v. *Cosmopolitan Chinook*, 21 Wash. App. 929, 587 P.2d 191, 194-195 (1978). However, whether a partnership exists is a matter of fact which depends on the intention of the parties. *Allen* v. *Amber Manor Apartments Partnership*, 95 Ill. App. 3d 541, 420 N.E.2d 440, 446 (1981); *Klein* v. *Weiss*, 284 Md. 36, 395 A.2d 126, 135 (1978).

We conclude that whether a partnership which became Marietta Mines, Ltd., was formed prior to October 29, 1976, and whether the partnership that was formed was obligated prior to that date to pay an advanced mineral royalty are questions of fact which must be resolved from evidence received at trial.

Since respondent has failed to show that there is no genuine issue of material fact in this case with respect to the deductibility by Marietta Mines, Ltd., of the advanced royalty, his motion for partial summary judgment with respect to the disallowance of petitioners' claimed pro rata share of the 1976 loss of Marietta Mines, Ltd., occasioned by the deduction by that partnership of a $3 million advanced royalty will be denied. Since petitioners have likewise failed to show that no genuine issue of material fact exists with respect to this claimed loss by petitioners, their request for a summary determination in their favor is denied.

There is no factual dispute between the partners with respect to the issue of the minimum tax imposed by section 56. The undisputed facts show that in the taxable year 1976, petitioners had a long-term capital gain of $4,125,705.14 from the sale of mining stock. In computing their income tax for the calendar year 1976, petitioners, in accordance with the provisions of section 1202, reduced the $4,125,705.14 long-term capital gain by 50 percent thereof ($2,062,852.57) in determining their income subject to tax. On the face of their return petitioners showed adjusted gross income, including a capital gain of $2,062,852.57, of $1,340,801.77, tax of $640,428.23, credits against this tax of $115,665.22, and a balance of tax of $524,553.01. Petitioners attached to their return a Form 4625, Computation of Minimum Tax, which, except for a minor item not here in issue, showed the tax preference items as capital gains of $2,062,852.57 and a minimum tax of $270,289.53. On line 56 of their return petitioners placed a checkmark in the box indicating that there was attached to the return a Form 4625 showing a minimum tax of $270,289.53. However, on line 21, entitled "Other taxes (from line 62)," no amount was shown; on line 22 total taxes were shown as $524,553.01. From this amount was subtracted total taxes withheld and paid as estimated taxes of $263,223.85, leaving, as shown by the return, a balance of tax due of $261,329.16. Under date of April 15, 1977, respondent assessed on the basis of "return filed" $794,842.12 of taxes against petitioners for the year 1976. This assessment was composed of the $524,553.01 reported by petitioners as tax due on their return plus the $270,289.53 shown on the Form 4625 attached to their return as the minimum tax. In the notice of deficiency for the calendar year 1976 dated April 14, 1980, respondent determined a deficiency of $328,702.56 in petitioners' income tax. In arriving at the deficiency determined, the tax reported to be subtracted

from the tax liability as determined by respondent was shown as $794,842.12.

After making the assessment as of April 15, 1977, of the $794,842.12 as tax shown on the return, respondent commenced collection of a deficiency in payment by crediting refunds otherwise due to petitioners against the amount he showed as the unpaid balance of the tax returned.

The petition in this case was filed on July 9, 1980. This petition contained no assignment of error with respect to the portion of the notice of deficiency that dealt with the determination of the amount of minimum tax due by petitioners which, as heretofore stated, was shown in the notice of deficiency to be $243,418.42, nor were any facts alleged with respect to this determination.

On September 30, 1982, S. Franklin Burford (petitioner) filed, as plaintiff, an action in the United States District Court for the Southern District of West Virginia against the District Director of Internal Revenue and the United States of America to "Enjoin the Collection of Taxes Under Illegal Assessments." In the complaint, petitioner (plaintiff) alleged that he and his then wife had been advised by a letter dated October 28, 1977, of a balance owed on a prior assessment of $273,701.66, and that immediately following the receipt of this letter he contacted a representative of the Internal Revenue Service who told him a mistake which had been made would be corrected. Petitioner (plaintiff) further alleged that he heard nothing further until January 24, 1978, when a collection officer of the Internal Revenue Service visited him and advised him that an assessment had been made of minimum tax. The complaint further alleged that various communications between petitioner and representatives of the Internal Revenue Service occurred and that a collection officer, during the course of an exchange of letters, advised him that the minimum tax should not have been assessed with-

out the regular audit deficiency procedures which would have allowed him full appeal and conference procedures to stay collection. The complaint further alleged that amounts had been applied against the allegedly erroneous assessment from refunds otherwise due to the plaintiff for other years and other taxes. After these allegations, the District Court was requested to perpetually and forever enjoin the defendants from attempting to collect in any manner any sum whatsoever from plaintiff under the authority of or purported authority of this illegal and void assessment, to order the void assessment expunged and to enter an order awarding plaintiff his cost and grant such other and further relief to which he was entitled. On September 30, 1982, the United States District Court for the Southern District of West Virginia entered an order reciting that on September 30, 1982, the plaintiff, his counsel, and the United States Attorney on behalf of the defendants appeared before the court. The order recited that the hearing was upon the plaintiff's verified complaint and representations of plaintiff's counsel of having given telephonic notice of the hearing to agents of the defendants. The order further recited that the court proceeded to receive evidence and to hear the argument of counsel and, based thereon, granted the relief sought in the plaintiff's complaint. It was further ordered and adjudged that the defendants were enjoined from attempting to collect in any manner any sum from plaintiff under the authority of any assessment of Federal income tax, penalties and interest for the years 1976, 1977 and 1978, until further order by the court.

On June 20, 1983, respondent filed a motion for leave to file an amendment to answer, which was granted, and on July 14, 1983, respondent's amendment to answer was filed. In his amendment to answer, respondent alleged that the deficiency as computed in the notice of deficiency had shown

a deficiency of $328,702.56 by showing tax previously assessed of $794,842.12, which amount was overstated to the extent of $270,289.11, and that the correct deficiency in income tax due from petitioners for the year 1976 is $598,991.67. Petitioners, in their reply to this amendment to answer, alleged among other things that the amendment to answer takes away the credit for the minimum tax, ignores the accounts stated, but leaves the computation of minimum tax in the notice of deficiency as a part of the liability asserted therein and such tax must now be shown to the Court to be void and nonapplicable to this case or the Court would erroneously conclude that petitioners have conceded the claim for that void and nonapplicable tax, which they expressly do not. The reply further alleged that the minimum tax is unconstitutional.

On August 17, 1983, petitioners filed a motion for leave to file an amendment to petition in which they alleged that in accordance with section 6201(a)(1), respondent assessed $524,593.01 as income tax for the taxable year 1976 and in accordance with section 6204 assessed, on June 20, 1977, an additional amount of $273,701.66 as income tax for the taxable year 1976 and interest. Petitioners further stated in their motion that in the statutory notice of deficiency in this case respondent gave official notification to petitioners of $794,842.12 tax previously assessed. They further stated that the statutory notice reflected a minimum tax and then reflected a credit for the full minimum tax, thereby depriving petitioners of any ground on which to petition the Court with respect to that minimum tax. The motion further stated that respondent's amendment to answer served on petitioners on July 14, 1983, takes away the credit for the minimum tax but leaves the computation of minimum tax in the notice of deficiency as a portion of the liability asserted. Lodged with the motion to file an amendment to petition was a document entitled "Supplement to Petition" which

was filed September 20, 1983, after the granting of petitioners' motion filed August 17, 1983. In this supplement to petition, petitioners alleged error in the Commissioner's determination of a minimum tax in the amount of $243,418.42. As grounds for the alleged error, petitioners stated that the minimum tax imposed by section 56 was unconstitutional. The petition then alleged the various amounts that had been collected by respondent toward the payment of the minimum tax by crediting of refunds otherwise due them, and in the prayer requested the Court to determine that petitioners had made an overpayment of income tax for the calendar year 1976.

On August 15, 1983, respondent abated the $270,289.11 of minimum tax which previously had been assessed and determined overpayment credits for the amounts collected on this assessment, the overpayments determined plus interest thereon amounting to $313,346.78, which was refunded to petitioners. On February 6, 1984, respondent filed a motion to substitute amendment to answer, attaching thereto the proposed amendment to answer, which motion was granted on February 6, 1984. In the substituted amendment to answer filed that day, respondent alleged (1) the previous assessment of the $270,289.11 minimum tax; (2) the suit brought by petitioner in the United States District Court to enjoin respondent from collecting on authority of his assessment of the minimum tax; and (3) that on August 15, 1983, the tax had been abated and that all amounts collected under this assessment, plus interest thereon, had been refunded. Based on these facts, respondent alleged the correct deficiency in income tax due from petitioners for 1976 was $598,991.67, which represented an increase over the deficiency shown in the notice of deficiency of $270,289.11. In the substituted amendment to answer, respondent sought a determination of an increased deficiency of $270,289.11.

The first argument made by petitioners in opposition to respondent's motion for partial summary judgment with respect to the minimum tax is in effect an argument that this Court lacks jurisdiction to redetermine the minimum tax. Petitioners state that no deficiency in minimum tax was determined in the notice of deficiency dated April 14, 1980, because that tax had been previously assessed and for this reason this Court should make no determination regarding the minimum tax.

Petitioners fail to understand the jurisdictional limitations of this Court. Section 6212(a) provides for the sending of a notice of deficiency in income tax to a taxpayer by respondent. Section 6213(a) provides that where a notice of deficiency has been sent to a taxpayer, the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Section 6214(a) specifically confers jurisdiction on this Court to find an increased deficiency if claim therefor is asserted by respondent. Section 6512(a) provides that where respondent has mailed to a taxpayer a notice of deficiency under section 6212(a) and the taxpayer has filed a petition with the Tax Court within the prescribed time, no credit or refund of income tax for the same taxable year to which the petition relates shall be allowed or made, and no suit by the taxpayer to recover any part of that tax shall be instituted in any court, except as to overpayments determined by a final decision of the Tax Court. It is clear that where a notice of deficiency in income tax has been properly sent to a taxpayer and a petition timely filed, this Court has jurisdiction to redetermine the entire income tax liability of the taxpayer. Where the purported notice of deficiency determines an overassessment in income tax for a particular fiscal or calendar year rather than a deficiency for that year, this Court has no jurisdiction to redetermine the tax for the year for which the overassessment was determined. See *Paccon, Inc.* v. *Commissioner,* 45 T.C. 392

(1966). However, where the deficiency notice mailed to the taxpayer by respondent meets all the requirements of a statutory notice of deficiency and notifies the taxpayer of a deficiency in income tax and a timely petition is filed, the Court does have jurisdiction to redetermine the amount of deficiency or determine there is no deficiency or that there is an overpayment of tax. See *Hannan* v. *Commissioner*, 52 T.C. 787 (1969).

Since respondent has determined a deficiency in petitioners' income tax for the calendar year 1976, this Court has jurisdiction to redetermine the proper amount of income tax owed by petitioners and to determine an increased deficiency if one exists and claim therefor is made by respondent. This Court also has jurisdiction to determine an overpayment of tax if one exists and claim therefor is made by petitioners.

We have previously held that the minimum tax imposed by section 56, arising from the deduction allowed with respect to long-term capital gains, is a form of income tax. *Graff* v. *Commissioner*, 74 T.C. 743, 767 (1980), affd. per curiam 673 F.2d 784 (5th Cir. 1982). Therefore, this Court does have the jurisdiction in this case to redetermine the minimum tax.

Petitioners rely on our statement in *Heasley* v. *Commissioner*, 45 T.C. 448, 458 (1966), to support their conclusion that we are not concerned with collection matters and thus should not grant respondent's motion for summary judgment. Petitioners argue that since respondent made an assessment of the minimum tax, the matter is only a collection matter. It is clear, not only in *Heasley* v. *Commissioner, supra*, as a whole but in numerous other cases that once a deficiency has been determined and this Court properly redetermines the amount of the tax liability, the amount of resulting deficiency may be computed under Rule 155. In that computation previous assessments, abate-

ments, or rebates of payments may be considered. In fact, shortly after the statement with respect to collection matters was made in *Heasley* v. *Commissioner, supra* at 458, we stated that in the recomputation under Rule 155 (then Rule 50), the deficiency should be computed showing the previous assessment that was based on the tax shown on the return as filed. There was no question of jurisdiction involved in *Heasley* v. *Commissioner, supra.* It was clear in that case that the notice sent to the taxpayer determined a deficiency in the taxpayer's income tax. We stated in *Heasley* v. *Commissioner, supra* at 456, that the situation as it exists at the date of the mailing of the notice of deficiency governs whether a statutory deficiency exists. We have jurisdiction to redetermine the deficiency in this case because a statutory deficiency existed when the notice of deficiency was mailed and a deficiency was determined in that notice.

In the notice of deficiency, respondent determined the minimum tax at a lesser amount than the $270,289.53 shown on the Form 4625 that was attached to petitioners' return. For that reason a recomputation under Rule 155 will be necessary in this case. In determining the amount of the deficiency, the relevant considerations are the initial assessment, the order of the District Court, the abatement of the tax, and the refund of the amounts collected on the tax which the District Court determined was erroneously assessed. When this Court has entered its decision as to the deficiency in petitioners' income tax for the year 1976, the amount of the deficiency determined may be assessed and collected. This Court is not prohibited from considering payments or refunds made subsequent to the mailing of the notice of deficiency in entering its decision as to the existence of a deficiency or an overpayment.

The only substantive claim made by petitioners with respect to the minimum tax is that the minimum tax im-

posed by section 56 is unconstitutional because it was not properly explained to the Congress or to the President when it was enacted and because it effectively is an excise tax. This is the same issue that was before us in *Graff* v. *Commissioner, supra,* and in that case we held that the minimum tax imposed by section 56 is an income tax, that it was constitutional and did not violate the Equal Protection Clause of the 14th Amendment. In that case we called attention to the cases of *Estate of Kearns* v. *Commissioner,* 73 T.C. 1223 (1980); *Buttke* v. *Commissioner,* 72 T.C. 677 (1979), aff'd. per curiam 625 F.2d 202 (8th Cir. 1980); *Kolom* v. *Commissioner,* 71 T.C. 235 (1978), affd. 644 F.2d 1282 (9th Cir. 1981). In each of these cases some attack on the constitutionality of the minimum tax imposed by section 56 on an equitable ground was made and rejected. On the basis of the uncontested facts in this case, we hold that respondent is entitled to summary judgment that petitioners are liable for the minimum tax imposed by section 56 with respect to the $2,062,852.57 of capital gains deduction taken by petitioners on their Federal income tax return for the calendar year 1976. The amount of minimum tax may be recomputed under Rule 155 after the other issues in this case have been disposed of. At that time petitioners' proper tax liability (without regard to the minimum tax), which is used in the computation of the minimum tax, will be determinable.

An appropriate order will be entered.

UNITED STATES TAX COURT

Docket No. 12466-80

S. FRANKLIN BURFORD, - - - - *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, - - *Respondent.*

DECISION

Pursuant to the opinion of the Court filed September 4, 1984 with respect to the minimum tax issue, and incorporating the facts recited in the respondent's computation as the findings of the Court and the settlement of other issues by the parties, it is:

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioner in the amount of $363,075.09 for the year 1976.

(s) Theodore Tannenwald, Jr.
Judge.

Entered: January 8, 1986

It is stipulated that

1. The foregoing decision is in accordance with the opinion of the Court, the settlement of the parties and the respondent's recomputation, and that the Court may enter this decision.

2. Any interest due on any deficiency is not included in any amount shown in this decision.

3. The parties agree that Petitioner has the right to appeal the issues reached by the Tax Court in Burford v. Commissioner, T.C.M. 1984-466.

Fred T. Goldberg, Jr.
Chief Counsel
Internal Revenue Service

(s) By: Cynthia J. Mattson
Cynthia J. Mattson
Senior Trial Attorney
1875 Connecticut Ave. N.W.
Washington D.C. 20009

(s) S. Franklin Burford
S. Franklin Burford
Petitioner
South Beach, Apt. 1212
1480 Gulf Blvd.
Clearwater, Florida 33515

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-2010

S. FRANKLIN BURFORD, - - - - - *Appellant,*

v.

COMMISSIONER OF INTERNAL REVENUE, - - *Appellee.*

Appeal from the United States Tax Court
Judge Tannenwald, Tax Court Judge
(Tax Ct. No. 12466-80)

Argued: June 2, 1986. Decided: September 11, 1986

Before RUSSELL and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Michael E. Caryl (S. Franklin Burford on brief) for Appellant; Mary Frances Clark (Michael L. Paup, Chief, Appellate Section; Richard Farber; Roger M. Olsen, Acting Assistant Attorney General on brief) for Appellee.

PER CURIAM:

Petitioner S. Franklin Burford appeals from a decision of the Tax Court determining a deficiency in his 1976 income tax. Petitioner contends the Tax Court lacked jurisdiction to consider his deficiency for the minimum tax imposed by 11 U.S.C. § 56 because said deficiency was not included in the notice of deficiency which respondent-appellee Commissioner of Internal Revenue had sent to petitioner, but was later raised in the Commissioner's amend-

ment to the answer. Holding that the Tax Court properly exercised its jurisdiction, we affirm.

I.

On his 1976 income tax return, petitioner claimed a deduction for a long-term capital gain from the sale of mining stock. Although petitioner computed on Form 4625 his minimum tax on the capital gain tax preference, he failed to include on his return such minimum tax as part of his total tax liability. As a result, the Commissioner treated the omission as a clerical or mathematical error and made an assessment, pursuant to 26 U.S.C. § 6213 (b)(1), of the omitted minimum tax.

The Commissioner subsequently recalculated petitioner's 1976 income tax, determined deficiency, and so informed petitioner through a notice of deficiency. Filing a petition in the Tax Court, petitioner sought a redetermination of the deficiency. The petition bore no claim of error with respect to the portion of the notice of deficiency that dealt with the determination of the amount of minimum tax. However, while the petition was pending, petitioner filed an action in the United States District Court for the Southern District of West Virginia contending that the assessment of the minimum tax was illegal and requesting that collection of such assessment be enjoined. The district court immediately issued a preliminary injunction barring any collection attempts by the Commissioner.[1] Apparently in response to the injunction, the Commissioner abated the assessment of the minimum tax and refunded to petitioner money which the Commissioner, pursuant to

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[1]The district court dismissed the complaint July 1, 1985 for petitioner's failure to respond to an order directing petitioner to submit a statement indicating whether he desired to prosecute his claims.

that assessment, had collected out of refunds otherwise due petitioner.[2] However, the Commissioner subsequently filed in the Tax Court an amendment to his answer seeking to increase the deficiency by the amount of the abatement of the minimum tax assessment.

Granting the Commissioner's motion for partial summary judgment, the Tax Court held petitioner liable for the increased deficiency, including the deficiency in minimum tax that had not been reflected in the notice of deficiency but had been raised in the amendment to the answer.

II.

Petitioner argues the Tax Court lacked jurisdiction to determine a deficiency as to the minimum tax because that specific deficiency was not raised by the notice of deficiency. In *Braude* v. *Commissioner,* No. 86-1016, slip. op. at 4-5 (4th Cir. July 16, 1986), however, we rejected a nearly identical argument and held that "the Tax Court had jurisdiction to consider a deficiency not included in the Notice of Deficiency sent to petitioners by the Internal Revenue Service but raised by the Service's request to amend its answer more than three years after the statute of limitations began to run." *Id.* at 2. For the reasons expressed in *Braude, supra,* and for the additional reasons enumer-

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[2]The Commissioner indicates in his brief that the "decision to abate the assessment previously made against taxpayer with respect to his minimum tax liability apparently was precipitated by taxpayer's injunctive suit in the district court."

ated by the Tax Court, *Burford* v. *Commissioner*, 48 T.C.M. (CCH) 1001 (1984), we affirm.[3]

AFFIRMED.

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[3]Petitioner, an experienced attorney, also contends that the minimum tax is unconstitutionally vague because he misunderstood the instructions for reporting the minimum tax; that despite overwhelming judicial authority to the contrary, the minimum tax is unconstitutional because it is not an income tax; and that he was denied due process because the district judge was biased. We consider such contentions to be without merit.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-2010

S. FRANKLIN BURFORD, - - - - - *Appellant,*

v.

COMMISSIONER OF INTERNAL REVENUE, - - *Appellee.*

ORDER—Filed October 21, 1986

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell, with the concurrence of Judge Ervin and Judge Butzner.

For the Court,

John M. Greacen
Clerk

STATUTORY PROVISIONS

26 U.S.C. § 6211. DEFINITION OF A DEFICIENCY. (1980)

(a) In General.—For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, 44, and 45 the term "deficiency" means the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, 44, or 45 exceeds the excess of—

(1) the sum of—

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

(b) Rules for Application of Subsection (a).—For purposes of this section—

(1) the tax imposed by subtitle A and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 31, without regard to the credit under section 33, and without regard to any credits resulting from the collection of amounts assessed under section 6851 (relating to termination assessments).

(2) The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by subtitle A or B or chapter 41, 42, 43, 44, or 45 was less than the excess

of the amount specified in subsection (a)(1) over the rebates previously made.

(3) The computation by the Secretary, pursuant to section 6014, of the tax imposed by chapter 1 shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

(4) The tax imposed by subtitle A and the tax shown on the return shall both be determined without regard to the credit under section 34, unless, without regard to such credit, the tax imposed by subtitle A exceeds the excess of the amount specified in subsection (a)(1) over the amount specified in subsection (a)(2).

(5) The amount withheld under section 4995(a) from amounts payable to any producer for crude oil removed during any taxable period (as defined in section 4996(b)(7)) which is not otherwise shown on a return by such producer shall be treated as tax shown by the producer on a return for the taxable period.

(6) Any liability to pay amounts required to be withheld under section 4995(a) shall not be treated as a tax imposed by chapter 45.

26 U.S.C. § 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT. (1984)

(a) Time for Filing Petition and Restriction on Assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, 44,

or 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) Exceptions to Restrictions on Assessment.—

(1) Assessments arising out of mathematical or clerical errors.—If the taxpayer is notified that, on account of a mathematical or clerical error appearing on the return, an amount of tax in excess of that shown on the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical or clerical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section 6212(c)(1) (restricting further deficiency letters), or of section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section. Each notice under this paragraph shall set forth the error alleged and an explanation thereof.

(2) Abatement of assessment of mathematical or clerical errors.—

(A) Request for abatement.—Notwithstanding section 6404(b), a taxpayer may file with the Secretary within 60 days after notice is sent under paragraph (1) a request for an abatement of any assessment specified in such notice and upon receipt of such request, the Secretary shall abate the assessment. Any reassessment of the tax with respect to which an abatement is made under this subparagraph shall be subject to the deficiency procedures prescribed by this subchapter.

(B) Stay of collection.—In the case of any assessment referred to in paragraph (1), notwithstanding paragraph (1), no levy or proceeding in court for the collection of such assessment shall be made, begun, or prosecuted during the period in which such assessment may be abated under this paragraph.

(3) Assessments arising out of tentative carryback or refund adjustments.—If the Secretary determines that the amount applied credited, or refunded under section 6411 is in excess of the overassessment attributable to the carryback or the amount described in section 1341(b)(1) with respect to which such amount was applied, credited, or refunded, he may assess without regard to the provisions of paragraph (2) the amount of the excess as a deficiency as if it were due to a mathematical or clerical error appearing on the return.

(4) Assessment of amount paid.—Any amount paid as a tax or in respect of a tax may be assessed upon the receipt of such payment notwithstanding the provisions of subsection (a). In any case where such amount is

paid after the mailing of a notice of deficiency under section 6212, such payment shall not deprive the Tax Court of jurisdiction over such deficiency determined under section 6211 without regard to such assessment.

(c) Failure To File Petition.—If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.

(d) Waiver of Restrictions.—The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency.

(e) Suspension of Filing Period for Certain Excise Taxes.—The running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to the taxes imposed by section 4941 (relating to taxes on self-dealing), 4942 (relating to taxes on failure to distribute income), 4943 (relating to taxes on excess business holdings), 4944 (relating to investments which jeopardize charitable purpose), 4945 (relating to taxes on taxable expenditures), 4951 (relating to taxes on self-dealing), or 4952 (relating to taxes on taxable expenditures), 4971 (relating to excise taxes on failure to meet minimum funding standard), 4975 (relating to excise taxes on prohibited transactions) shall be suspended for any period during which the Secretary has extended the time allowed for making correction under section 4963(e).

(f) Coordination With Title 11.—

(1) Suspension of running of period for filing petition in title 11 cases.—In any case under title 11 of the

United States Code, the running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to any deficiency shall be suspended for the period during which the debtor is prohibited by reason of such case from filing a petition in the Tax Court with respect to such deficiency, and for 60 days thereafter.

(2) Certain action not taken into account.—For purposes of the second and third sentences of subsection (a), the filing of a proof of claim or request for payment (or the taking of any other action) in a case under title 11 of the United States Code shall not be treated as action prohibited by such second sentence.

(g) Definitions.—For purposes of this section—

(1) Return.—The term "return" includes any return, statement, schedule, or list, and any amendment or supplement thereto, filed with respect to any tax imposed by subtitle A or B, or chapter 41, 42, 43, 44, or 45.

(2) Mathematical or clerical error.—The term "mathematical or clerical error" means—

(A) an error in addition, subtraction, multiplication, or division shown on any return,

(B) an incorrect use of any table provided by the Internal Revenue Service with respect to any return if such incorrect use is apparent from the existence of other information on the return.

(C) an entry on a return of an item which is inconsistent with another entry of the same or another item on such return,

(D) an omission of information which is required to be supplied on the return to substantiate an entry on the return, and

(E) an entry on a return of a deduction or credit in an amount which exceeds a statutory limit imposed by subtitle A or B, or chapter 41, 42, 43, 44, or 45, if such limit is expressed—

(i) as a specified monetary amount, or

(ii) as a percentage, ratio, or fraction,

and if the items entering into the application of such limit appear on such return.

(h) Cross References.—

(1) For assessment as if a mathematical error on the return, in the case of erroneous claims for income tax prepayment credits, see section 6201(a)(3).

(2) For assessments without regard to restrictions imposed by this section in the case of—

(A) Recovery of foreign income taxes, see section 905(c).

(B) Recovery of foreign estate tax, see section 2016.

(3) For assessment as if a mathematical error on the return, in the case of erroneous claims for credits under section 32 or 34, see section 6201(a)(4).

(4) For provision that this chapter shall not apply in the case of computational adjustments attributable to partnership items, see section 6230(a).

26 U.S.C. § 6214. DETERMINATIONS BY TAX COURT. (1984)

(a) Jurisdiction as to Increase of Deficiency, Additional Amounts, or Additions to the Tax.—Except as provided by section 7463, the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer,

and to determine whether any additional amount, or addition to the tax should be assessed, if claim therefor is asserted by the Secretary at or before the hearing or a rehearing.

(b) Jurisdiction Over Other Years and Quarters.—The Tax Court in redetermining a deficiency of income tax for any taxable year or of gift tax for any calendar year or calendar quarter shall consider such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid.

(c) Taxes imposed by Section 507 or Chapter 41, 42, 43, 44, or 45.—The Tax Court in redetermining a deficiency of any tax imposed by section 507 or chapter 41, 42, 43, 44, or 45 for any period, act, or failure to act, shall consider such facts with relation to the taxes under chapter 41, 42, 43, 44, or 45 for other periods, acts, or failures to act as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the taxes under chapter 41, 42, 43, 44, or 45, for any other period, act, or failure to act have been overpaid or underpaid. The Tax Court, in redetermining a deficiency of any second tier tax (as defined in section 4962(d)), shall make a determination with respect to whether the taxable event has been corrected.

(d) Final Decisions of Tax Court.—For purposes of this chapter, chapter 41, 42, 43, 44, or 45, and subtitles A or B the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 7481.

(e) Cross Reference.—

For provision giving Tax Court jurisdiction to determine whether any portion of deficiency is a substantial underpayment attributable to tax motivated transactions, see section 6621(d)(4).

26 U.S.C. § 6404. ABATEMENTS. (1954)

(a) General Rule.—The Secretary is authorized to abate the unpaid portion of the assessment of any tax or any liability in respect thereof, which—

(1) is excessive in amount, or

(2) is assessed after the expiration of the period of limitations properly applicable thereto, or

(3) is erroneously or illegally assessed.

(b) No Claim for Abatement of Income, Estate, and Gift Taxes.—No claim for abatement shall be filed by a taxpayer in respect of an assessment of any tax imposed under subtitle A or B.

(c) Small Tax Balances.—The Secretary is authorized to abate the unpaid portion of the assessment of any tax, or any liability in respect thereof, if the Secretary determines under uniform rules prescribed by the Secretary that the administration and collection costs involved would not warrant collection of the amount due.

(d) Assessments Attributable to Certain Mathematical Errors by Internal Revenue Service.—In the case of an assessment of any tax imposed by chapter 1 attributable in whole or in part to a mathematical error described in section 6213(g)(2)(A), if the return was prepared by an officer or employee of the Internal Revenue Service acting in his official capacity to provide assistance to taxpayers in the preparation of income tax returns, the Secretary is authorized to abate the assessment of all or any part of an interest on such deficiency for any period ending on or

before the 30th day following the date of notice and demand by the Secretary for payment of the deficiency.

26 U.S.C. § 6502. COLLECTION AFTER ASSESSMENT. (1966)

(a) Length of Period.—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release.)

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The period provided by this subsection during which a tax may be collected by levy shall not be extended or curtailed by reason of a judgment against the taxpayer.

(b) Date When Levy Is Considered Made.—The date on which a levy on property or rights to property is made shall be the date on which the notice of seizure provided in section 6335(a) is given.

26 U.S.C. § 6512. LIMITATIONS IN CASE OF PETITION TO TAX COURT. (1962)

(a) Effect of Petition to Tax Court.—If the Secretary has mailed to the taxpayer a notice of deficiency under section 6212(a) (relating to deficiencies of income, estate, gift, and certain excise taxes) and if the taxpayer files a

petition with the Tax Court within the time prescribed in section 6213(a), no credit or refund of income tax for the same taxable year, or gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, or of tax imposed by chapter 45 for the same taxable period, in respect of which the Secretary has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except—

(1) As to overpayment determined by a decision of the Tax Court which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final; and

(3) As to any amount collected after the period of limitation upon the making of levy or beginning a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Tax Court which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive, *and*

(4) As to overpayments attributable to partnership items, in accordance with subchapter C of chapter 63.

(b) Overpayment Determined by Tax Court.—

(1) Jurisdiction to determine.—Except as provided by paragraph (2), and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, of tax imposed by

chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, or of tax imposed by chapter 45 for the same taxable period, in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer.

(2) Limit on amount of credit or refund.—No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid—

(A) after the mailing of the notice of deficiency,

(B) within the period which would be applicable under section 6511 (b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment or

(C) within the period which would be applicable under section 6511(b)(2), (c), or (d), in respect of any claim for refund filed within the applicable period specified in section 6511 and before the date of the mailing of the notice of deficiency—

(i) which had not been disallowed before that date,

(ii) which had been disallowed before that date and in respect of which a timely suit for refund could have been commenced as of that date, or

(iii) in respect of which a suit for refund had been commenced before that date and within the period specified in section 6532.

(c) Cross Reference.—

For provisions allowing determination of tax in title 1 cases, see section 505(a) of title 11 of the United States Code.

26 U.S.C. § 7442. JURISDICTION. (1954)

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

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No. 86-1188

In the Supreme Court of the United States

OCTOBER TERM, 1986

S. FRANKLIN BURFORD, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the Tax Court lacked jurisdiction to redetermine that portion of his tax liability attributable to an increased deficiency asserted in an amendment to the Commissioner's answer.

1. On his income tax return for 1976, petitioner reported capital gain of approximately $4 million. In computing his tax on that gain, petitioner claimed a deduction, pursuant to Section 1202 of the Internal Revenue Code,[1] equal to 50% of his capital gain, or $2,062,853. Because that deduction constituted an "item of tax preference," petitioner became liable for the "minimum tax" imposed by 26 U.S.C. (1976 ed.) 56. Pet. App. 11a.[2]

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

[2] Section 56, as in effect for the 1976 taxable year, provided that "[i]n addition to the other taxes imposed by this chapter, there is hereby imposed for each taxable year, with respect to the income of every person, a tax" measured by items of tax preference. This "minimum tax" was equal to 15% of the excess of the amount of tax

Petitioner computed his minimum tax liability, in the amount of $270,290, on IRS Form 4625. He attached that Form to his return, and he reported that liability on line 56 of his return. Pet. App. 11a. Petitioner did not, however, include this minimum tax liability in his computation of the total tax liability that was due to be paid with his return. The Commissioner treated this omission as a clerical or mathematical error and made an assessment against petitioner, pursuant to Section 6213(b)(1) of the Code, in the amount of the minimum tax due. Pet. App. 11a.[3]

Subsequently, the Commissioner examined petitioner's return and determined that his income tax liability for 1976 also was understated for reasons apart from the minimum tax. Accordingly, he issued a notice of deficiency for that year. The amount of the deficiency asserted in that notice did not include the amount of minimum tax liability shown on the return because, as explained above, that amount had previously been assessed under Section 6213(b)(1). The notice of deficiency did *refer* to minimum tax liability in the calculation of the petitioner's total tax liability. However, the minimum-tax amount shown on the return was then subtracted as an "amount[] previously assessed" (I.R.C. § 6211(a)(1)(B)) in computing the amount of the deficiency. See C.A. App. 26.

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preference items over the greater of $10,000 or one-half of the taxpayer's regular income tax liability (with certain adjustments). Included among the specified items of tax preference was the deduction for capital gain provided in Section 1202 of the Code. See 26 U.S.C. (1976 ed.) 57(a)(9)(A).

[3] Section 6213(b)(1) authorizes an assessment on the basis of what would have been the correct amount of tax but for a mathematical or clerical error appearing on the return. The notice informing the taxpayer of such an assessment is not considered a statutory notice of deficiency, and "the taxpayer shall have no right to file a petition with the Tax Court based on such notice." *Ibid.*

Petitioner filed a petition in the United States Tax Court, seeking a redetermination of the deficiency and a determination that he had overpaid his income tax for 1976. The petition did not contain any assignment of error with respect to that portion of the deficiency notice that showed the minimum-tax amount as a component of petitioner's total liability. Nor did petitioner allege any facts with respect to the determination of the minimum tax. Pet. App. 11a-12a.

While this case was pending in the Tax Court, petitioner brought an action in the United States District Court for the Southern District of West Virginia. He contended, inter alia, that his failure to include the minimum-tax amount on his 1976 tax return was not a mere "mathematical or clerical error," and hence that the Commissioner had improperly assessed that amount under Section 6213(b)(1). See Pet. App. 12a-13a. Petitioner sought an injunction against collection of the assessment, and the district court granted a preliminary injunction to that effect. The Commissioner thereupon abated the Section 6213(b)(1) assessment and refunded to petitioner the amounts that had been collected pursuant thereto. Pet. App. 12a-13a, 15a.[4]

As a result of the abatement of the Section 6213(b)(1) assessment, the Commissioner sought and obtained permission from the Tax Court to file an amendment to his answer. That amendment sought an increased deficiency in tax, over and above the amount set forth in the notice of deficiency, in order to reflect the amount of the assessment that had been abated. Petitioner objected on the ground that the Tax Court lacked jurisdiction to redeter-

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[4] The district court eventually dismissed petitioner's complaint upon his failure to respond to an order directing him to submit a statement indicating whether he desired to prosecute his claims. Pet. App. 23a n.1.

mine such an increased deficiency. Petitioner also claimed that the minimum tax, the source of the increased deficiency, was unconstitutional. The Tax Court rejected both contentions and found that petitioner was liable for the asserted deficiency, including the minimum tax owed (Pet. App. 16a-19a). The court of appeals unanimously affirmed in a per curiam decision (*id.* at 22a-25a).

2. There is no merit to petitioner's contention that the Tax Court lacked jurisdiction to determine a deficiency in an amount that included his unpaid minimum tax liability. Petitioner does not allege (nor is there) a conflict among the circuits on any question presented here. There is no basis for further review.

At the outset, we note that petitioner does not dispute that he is liable for the full amount of the minimum tax asserted by the Commissioner. Petitioner's jurisdictional contention is a transparent effort to avoid paying this clear liability. When the Commissioner treated petitioner's omission from his 1976 return of the computed minimum tax liability as a clerical mistake, and accordingly made an immediate assessment under Section 6213(b)(1), petitioner sought in district court to enjoin collection on the ground that the assessment was invalid. When the Commissioner accepted petitioner's contention and abated that assessment, petitioner then sought to defeat the Tax Court's jurisdiction over the issue by asserting in that court that the assessment was valid and that the Commissioner's abatement of it should be voided as exceeding his authority. The courts below correctly rejected petitioner's ploy; the Tax Court plainly had jurisdiction to determine a deficiency in an amount that included petitioner's unpaid minimum tax liability.

Once a taxpayer has filed a petition with the Tax Court, the Tax Court acquires jurisdiction to determine the correct amount of the person's tax for that year. Section 6214(a) explicitly provides that "the Tax Court shall have

jurisdiction to redetermine the correct amount of the deficiency *even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer,* and to determine whether any additional amount, or addition to the tax should be assessed, if claim therefor is asserted by the Secretary at or before the hearing or a rehearing" (emphasis added). Thus, the statute could not be clearer that the non-inclusion of the minimum tax liability in the amount of the deficiency reflected on the original notice sent to petitioner poses no jurisdictional bar to the Tax Court's inclusion of the minimum tax in determining "the correct amount of the deficiency." See, *e.g., Ferrill* v. *Commissioner*, 684 F.2d 261, 265 (3d Cir. 1982); *Henningsen* v. *Commissioner*, 243 F.2d 954, 959 (4th Cir. 1957). The Commissioner here—by way of an amended answer—timely asserted a claim for an increased deficiency to reflect petitioner's minimum tax liability, and accordingly the Tax Court had jurisdiction to consider this claim under Section 6214(a). See Pet. App. 16a-18a.

Petitioner's contention (Pet. 6-7) that the Tax Court's jurisdiction over the minimum-tax issue is barred by Section 6211 of the Code is frivolous. Section 6211(a)(1)(B) states that, in computing the amount of a "deficiency" in tax, "the amounts previously assessed" must be subtracted from the total tax liability as determined by the Commissioner. This simply reflects the obvious fact that, to avoid double-counting, amounts that are already subject to collection because they have been assessed are not part of the "deficiency." Section 6211 does not remotely suggest that such amounts may not be made part of a Tax Court proceeding if the assessment is abated. To the contrary, the statute says that the "deficiency" subject to redetermination by the Tax Court shall be increased by "the amount of rebates," which are defined to include "abatements" and

"refunds." I.R.C. § 6211(a)(2) and (b)(2). The cases cited by petitioner (Pet. 7) in no way support his remarkable assertion to the contrary.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1987

[5] Petitioner's assertion (Pet. 8-10) that the Commissioner exceeded his authority in abating the assessment of minimum tax liability is also frivolous. Section 6404(a) generally authorizes the Commissioner to make abatements, and Section 6213(b)(2) specifically authorizes the Commissioner to abate assessments of clerical or mathematical errors. In any event, petitioner can scarcely complain that the Commissioner, in response to petitioner's own assertion that the assessment was invalid, abated the assessment and refunded the tax to him.

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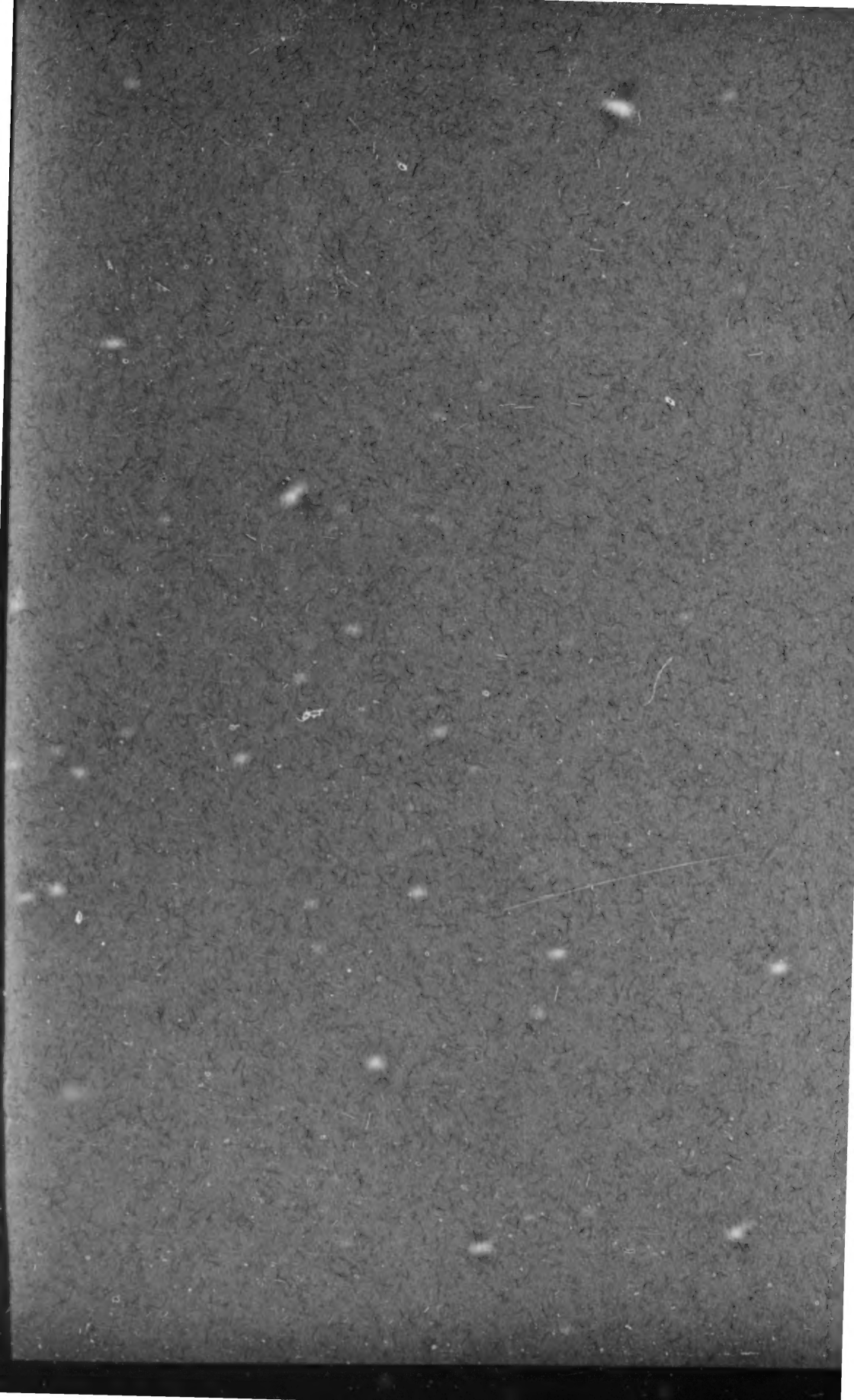

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No. 86-1188

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

S. FRANKLIN BURFORD, - - - Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE - - - - - - - Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY OF PETITIONER TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT K. EMERSON
Counsel of Record

HOWARD R. CREWS, JR.
J. PATRICK JONES
CAMPBELL, WOODS, BAGLEY, EMERSON, McNEER & HERNDON
Post Office Box 1835
Huntington, West Virginia 25719-1835
304-529-2391

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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REPLY OF PETITIONER TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

We believe it to be beyond dispute that the Tax Court may assert jurisdiction only over a tax "deficiency" of a taxpayer as defined in §6211. See, *Selma Heasley* v. *Commissioner,* 45 T.C. 448 (1966). This statute is unambiguous and establishes the following formula to define a "deficiency":

> "Deficiency" = "tax imposed" − "tax upon return" − "amounts previously assessed" + "amount of rebates"

In the instant case, the concepts of "tax imposed," "tax upon return," and "amounts previously assessed" have been properly applied by the respondent and the

United States Tax Court. The sole question here presented is whether the abatement and refund to the petitioner by the respondent of the minimum tax previously assessed constituted a "rebate" which becomes a part of the "deficiency" and increases the deficiency originally asserted.

In his memorandum in opposition, the respondent, by implication, agrees with the analysis above set forth, but argues that the abatement and refund in question constitute a rebate, and that, accordingly, the original deficiency may be increased to include the amount of tax imposed in the minimum tax issue. (Resp. 5). This argument cannot be sustained.

It is undisputed that in 1980 the respondent proposed in his statutory notice a deficiency in income tax of petitioner for the year 1976 in the amount of $328,-702.56. In arriving at this deficiency, the respondent imposed tax of $1,123,544.68 and subtracted therefrom (1) $524,553.01 in tax reported by petitioner on his return, all of which had been paid by wage withholding tax, estimated tax payments and the remittance which accompanied his return, and (2) the prior minimum tax assessment of $270,289.11. No amounts had been rebated at that time. In 1983 the respondent abated the minimum tax assessment made more than six years previously, refunded to petitioner the amounts collected under such assessment, treated the amounts so abated and refunded as a "rebate" and increased the deficiency by such amounts.

A "rebate" is a term of art narrowly defined in §6211(b)(2) to include only that part of an abatement

or refund which was made on the ground that the tax imposed by the respondent was less than the excess of (1) the tax shown on the return plus amounts previously assessed over (2) the amount of any rebates previously made. Therefore, no part of an abatement or a refund qualifies as a rebate for deficiency purposes if the tax imposed is greater than the excess of (1) the tax shown on the return plus amounts previously assessed over (2) the amount of prior rebates.

Regardless of whether the abatement of the minimum tax assessment and resultant refund were proper, it is plain that no part of the abatement or refund may be classified as a "rebate" under the novel circumstances here presented. As noted above, the tax imposed was $1,123,544.68. Obviously, the tax imposed was greater than the sum of $794,842.12, which amount is comprised of $524,553.01 in tax shown upon petitioner's return and the prior minimum tax assessment of $270,289.11. Therefore, no rebate existed for purposes of §6211. This result is dictated not only by statute, but also by respondent's own regulations. See, Treas. Reg. §301.6211-1(f) (1982). Since a rebate did not exist, the Tax Court lacked jurisdiction to increase the original deficiency by the amounts abated and refunded and to consider the minimum tax issue.

The respondent also contends that apart from the requirements of §6211 and, presumably despite the requirements of the §6211, the Tax Court had jurisdiction over the minimum tax issue because, under the provisions of §6214, the respondent may redetermine the correct amount of the deficiency even if the

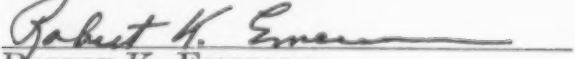
amount so redetermined is greater than the amount set forth in the deficiency notice. (Resp. 4-5). This argument is specious because it begs the question. Section 6214, by its own terms, is limited to the redetermination of a "deficiency" which is defined in §6211. As hereinabove pointed out, the minimum tax issue cannot be considered as part of the "deficiency."

It should also be noted that the cases cited by the respondent in support of the application of §6214 are inopposite because none of those cases involved a prior assessment included in the "deficiency" asserted. Indeed, the Tax Court has limited the scope of §6214 to embrace only those items which comprise a statutory "deficiency." See, *Robert Bregin* v. *Commissioner,* 74 T.C. 1097 (1980)

Respondent gratuitously states (Resp. 4) that "**petitioner does not dispute that he is liable for the full amount of minimum tax asserted by Commissioner." It is petitioner's contention, as set forth in his brief supporting his petition, that petitioner has the right to have the minimum tax issue properly adjudicated by a court of competent jurisdiction subject to the applicable statute of limitations which respondent has attempted to extend by his procedural maneuvers before the Tax Court. By disregarding the required procedures, the respondent has denied the petitioner of this right.

Based upon the foregoing, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,



ROBERT K. EMERSON
Of Counsel of Record

HOWARD R. CREWS, JR.
J. PATRICK JONES
CAMPBELL, WOODS, BAGLEY, EMERSON, McNEER & HERNDON
Post Office Box 1835
Huntington, West Virginia 25719-1835
304-529-2391

PROOF OF SERVICE

The undersigned, of counsel for the petitioner and member of the Bar of this Court, does hereby certify that the foregoing Reply Brief to Memorandum for the Respondent in Opposition has been served in compliance with U. S. Sup. Ct. Rule 28.3 upon all parties required to be served by depositing three copies of the document in a United States Post Office, first-class postage prepaid, addressed to the following counsel of record at their post office address.

Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

Roger M. Olsen, Esquire
Acting Assistant Attorney General

Michael C. Paup, Esquire
Richard Farber, Esquire
Mary Frances, Esquire
Tax Division
Department of Justice
P. O. Box 502
Washington, D.C. 20044

Done the 9th day of April, 1987.

Robert K. Ewan

APPENDIX

TREAS. REG. § 301.6211-1(f)(1982).

(f) As used in section 6211, the term "rebate" means so much of an abatement, credit, refund, or other repayment as is made on the ground that the income tax imposed by subtitle A, the estate tax imposed by chapter 11, the gift tax imposed by chapter 12, or the excise tax imposed by chapter 41, 42, 43, or 44, is less than the excess of (1) the amount shown as the tax by taxpayer upon the return increased by the amount previously assessed (or collected without assessment) as a deficiency over (2) the amount of rebates previously made. For example, assume that the amount of income tax shown by the taxpayer upon his return for the taxable year is $600 and the amount claimed as a credit under section 31 for income tax withheld at the source is $900. If the district director determines that the tax imposed by subtitle A is $600 and makes a refund of $300, no part of such refund constitutes a "rebate" since the refund is not made on the ground that the tax imposed by subtitle A is less than the tax shown on the return. If, however, the district director determines that the tax imposed by subtitle A is $500 and refunds $400, the amount of $100 of such refund would constitute a rebate since it is made on the ground that the tax imposed by subtitle A ($500) is less than the tax shown on the return ($600). The amount of such rebate ($100) would be taken into account in arriving at the amount of any deficiency subsequently determined.